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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 614

THEODORE SPECTOR, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims, not yet reported, is printed as the appendix to the petition.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1964, and a timely petition for rehearing was denied on June 12, 1964. On September 4, 1964, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 23, 1964. The petition was filed on October 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior has the authority to remove for cause attorneys employed in his Department.

2. Whether petitioner was entitled to have the charge of incompetence made against him considered by a board comprised of practicing attorneys.

3. Whether petitioner's removal is invalid because the Administrative Assistant Secretary of Interior served as the Employment Policy Officer under Executive Order 10590.

EXECUTIVE ORDER AND REGULATIONS INVOLVED

Executive Order 10590, January 18, 1955, 20 Fed. Reg. 409, provides in pertinent part:

> Sec. 5. The head of each executive department and agency shall designate an official of his department or agency as Employment Policy Officer, and shall designate such Deputy Employment Policy Officers as may be necessary to assist the Employment Policy Officer to effectively carry out the policy of this order. The position of Employment Policy Officer shall be established outside of the division handling the personnel matters of the department or agency concerned. Each Employment Policy Officer shall be under the immediate supervision of the head of his department or agency, and shall be given the authority necesary to enable him to carry out his responsibilities under this order. All officials and employees of each department and agency shall

be advised of the name of its Employment Policy Officer.

Department of Interior Order No. 2596, November 3, 1950, provides in pertinent part:

> Subject: Delegation of authority to the Solicitor
>
> The Solicitor of the Department of the Interior may exercise all the authority of the Secretary of the Interior respecting the legal work, the attorney positions, and the attorney personnel of the Department of the Interior and its several agencies, including agencies established by the Secretary of the Interior to perform functions under the Defense Production Act of 1950.

Department of Interior Federal Personnel Manual Supplement, March 5, 1951, provides in pertinent part:

> *Delegation of Authority.* The official to whom authority has been delegated to make appointments is delegated the power to make removals to the extent of appointment authority, with the exception of those cases on which final removal action is reserved to the Office of the Secretary by Order 2597, or by the head of the bureau.

Department of Interior Departmental Manual, April 6, 1955, part 110, chapter 2.6, provides:

> *Administrative Assistant Secretary.* The Administrative Assistant Secretary discharges the duties of the Secretary with respect to administrative management and directs and supervises the Division of Administrative Services, Division of Budget and Finance, Division of Inspection, Di-

vision of Management Research, Division of Personnel Management, Division of Property Management and Division of Security. His authority extends to all matters except a few which require the personal attention of the Secretary.

STATEMENT

On December 6, 1956, the Solicitor of the Department of the Interior advised petitioner, a non-veteran attorney assigned to the Solicitor's office, that he proposed to seek petitioner's dismissal (Pet. App. 7, 13). The Solicitor alleged that petitioner's work had been "unprofessional, unreliable, inaccurate, and unresponsive" and supported the charge of "inefficiency and incompetency" with 49 documentary exhibits involving 10 cases which petitioner had handled. The Solicitor's charges and petitioner's response were referred to the Administrative Assistant Secretary, who decided that the charges had been sustained (Pet. App. 13).

Under the Lloyd-LaFollette Act, 5 U.S.C. 652, petitioner was not entitled to a hearing on the charges preferred against him. He invoked, however, a regulation of the Department of the Interior providing for the designation of an "impartial board" to re-evaluate the merits of charges made against employees of that Department (Pet. App. 14). Accordingly, the Administrative Assistant Secretary appointed a committee of three officials of the Department to consider petitioner's appeal. After the hearing, at which petitioner was represented by counsel, the committee unanimously found that the Solicitor's charges had been sustained and recommended that the Solicitor's de-

cision to discharge petitioner be approved (Pet. App. 15). The Secretary of the Interior thereupon advised petition "that it is my decision to sustain your separation * * *" (Pet. App. 16).

Petitioner previously had complained of religious discrimination against him. Upon receipt of the Secretary's notification that he was being separated for cause, petitioner asked that a hearing be held on his complaint of religious discrimination under the provisions of Executive Order 10590 and that his dismissal be stayed pending the outcome of the hearing. In his capacity as Employment Policy Officer for the Department of the Interior, the Administrative Assistant Secretary appointed a committee to conduct the hearing, at which petitioner again was represented by counsel. This committee concluded "that there is no factual support for the contention that [petitioner's] removal from office on charges of incompetency was motivated by * * * anti-Semitism" (Pet. App. 17).

Petitioner appealed this decision to the President's Committee on Government Employment Policy, which reviewed the record and agreed that the charge of discrimination was unfounded (Pet. App. 18). Thereafter, petitioner was removed from his position.

Petitioner appealed to the Civil Service Commission, which upheld the Department's action (Pet. App. 19-20).[1] This suit for back pay was then instituted in

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[1] The Commission referred one of petitioner's claims—that that Department had failed to follow its own regulations—back to the Department of the Interior. The Department then concluded that its regulations had not been violated. The

the Court of Claims and tried on stipulated issues (Pet. App. 8). The Court of Claims upheld the discharge and dismissed the petition.

ARGUMENT

1. Departmental Order No. 2596, *supra*, p. 3, provides that the "Solicitor of the Department of the Interior may exercise all the authority of the Secretary of the Interior respecting the legal work, the attorney positions, and the attorney personnel of the Department * * *." The Department's Personnel Manual, *supra*, p. 3, provides that the "official to whom authority has been delegated to make appointments is delegated the power to make removals to the extent of appointment authority * * *." Taken together, petitioner maintains (Pet. 14-16) that these two provisions mean (a) that the Solicitor has been delegated the authority to separate attorneys from the Department and (b) that this delegation deprives the Secretary of the Interior of any authority to make such removals.

This contention is, on its face, erroneous. Departmental Order 2509 delegates to various subordinate officials almost all the Secretary's power over the Department. Plainly, however, the Secretary was not, contrary to his statutory authority over the Department (5 U.S.C. 481, 485), giving up virtually all his power except for the right to withdraw his delegation. Instead, as the Court of Claims found (Pet. App. 4):

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propriety of the referral, which was considered and upheld by the Court of Claims, is not at issue here.

> In none of the personnel delegations * * * did the Secretary divest himself of that authority [to act personally on separations]; the purpose of the delegations was to grant concurrent power, in designated fields, to various officials. The Secretary still retained all his powers as the head of the Department.[2]

2. Petitioner claims (Pet. 16-19) that he was entitled to have the merits of the charges against him —as contrasted to his allegation of religious discrimination—considered by a board of practicing lawyers. Under the Lloyd-LaFollette Act, however, the Secretary could have dismissed petitioner without any hearing. 5 U.S.C. 652(a).[3] Whatever right to a hearing petitioner had existed solely by virtue of the regulation of the Department of the Interior which provided that a hearing would be held before "an impartial board" (Pet. App. 14). Petitioner neither alleged nor offered to show that the board which considered his case was not impartial (Pet. App. 6, 8, 15).[4]

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[2] Petitioner relies on *Accardi* v. *Shaughnessy*, 347 U.S. 260, *Service* v. *Dulles*, 354 U.S. 363, and *Vitarelli* v. *Seaton*, 359 U.S. 535. These cases hold that the government may not violate its own regulations. Since here the Department of the Interior did not do so, these cases are not controlling.

[3] "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer * * * directing the removal * * *."

[4] Parenthetically, we note the inaccuracy of petitioner's observation that "where professional qualifications are at stake, it has become traditional if not essential that one's professional peers sit in judgment" (Pet. 17). Laymen, not professionals, judge the competence of doctors and lawyers in malpractice and other suits which turn on the adequacy of a professional's performance.

3. Executive Order 10590, *supra*, pp. 2-3, prohibits discrimination against employees because of race, color, religion or national origin, establishes the President's Committee on Government Employment Policy to implement this prohibition, and sets forth procedures to be followed when charges of discrimination are made. The Order, *inter alia*, requires the head of every executive department to appoint an official of the department as Employment Policy Officer and states that this position "shall be established outside of the division handling the personnel matters of the department * * *." Petitioner contends (Pet. 10-14) that the procedures followed in considering his allegation of religious discrimination were invalid because the Administrative Assistant Secretary was designated the Employment Policy Officer of the Department of the Interior and he had responsibility for personnel matters in the Department.

Even if petitioner is assumed to be correct in his reading of the order, however, he was not prejudiced. Petitioner's removal was effected upon the basis of a charge that he was incompetent and inefficient. While petitioner suggests that that charge was motivated by religious considerations, it was supported by ten detailed specifications. These specifications were considered not only by the Administrative Assistant Secretary but also by an impartial board of Department officials. It was unanimously concluded that the charge was sustained by the evidence.

More importantly, in the consideration of petitioner's assertion of religious discrimination, the

Administrative Assistant Secretary played a very limited role—the appointment of the committee to hear petitioner's complaint. It is not claimed that that committee—which found the complaint to be without substance—was biased. Further, petitioner exercised his right under the Executive Order to appeal to the President's Committee on Government Employment Policy. That Committee examined the entire record and likewise concluded that there was no foundation to the claim that petitioner had been discriminated against because of his religion.

In any event, the Executive Order did not preclude an Administrative Assistant Secretary from serving as an agency's Employment Policy Officer. The Assistant Secretary was not inside the division of the Department handling its personnel matters. As stated in the Department Manual, *supra*, pp. 3-4, he supervised this division, as well as six other divisions. Similarly, the Secretary himself ultimately ran the personnel division and all other divisions of the Department. However, neither the Secretary nor Assistant Secretary was within the personnel division; rather both were above it in the Department's organizational structure.

This interpretation of Executive Order 10590 is consistent with its uniform construction. As the court below found (Pet. App. 5), the President's Committee on Government Employment Policy, which itself had been established by that Order and had the responsibility of administering it (Pet. App. 20-21):

> generally considered the choice of the Administrative Assistant Secretary of a department or

> agency as its Employment Policy Officer to be within the purview of the Order, and indeed deemed such a designation as very desirable because of the high level of the appointee.

Moreover, as the Court of Claims also found, "the President's Committee officially and specifically approved the designation of the Administrative Assistant Secretary as Interior's Employment Policy Officer"; "[a]t least three cabinet departments selected their Administrative Assistant Secretary as Employment Policy Officer; [and] these appointments were known to and approved by the President's Committee" (Pet. App. 5).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
FLORENCE WAGMAN ROISMAN,
Attorneys.

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